UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 31

Docket No. DE-0752-07-0075-X-1

Raymond Sanchez, Jr.,

Appellant,

v.

Department of Homeland Security,

Agency.

March 11, 2009

Thomas F. Muther, Esquire, Lakewood, Colorado, for the appellant.

Michael N. Spargo, Esquire, Williston, Vermont, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board pursuant to a recommendation of the administrative judge finding the agency in noncompliance with a settlement agreement that had been entered into the record for purposes of enforcement by the Board. The administrative judge recommended that the appellant be afforded the opportunity to have his underlying appeal reinstated or, alternatively, to have the settlement agreement enforced absent a specific provision. We agree with the administrative judge's recommendation that the agency is in noncompliance with the settlement agreement but order that the terms of the settlement agreement be enforced as set forth below.

BACKGROUND

¶2 In 2006 the appellant filed an appeal of an agency action removing him from his criminal investigator position with Immigration and Customs Enforcement ("ICE") based on his 2001 off-duty misconduct. MSPB Docket No. DE-0752-07-0075-I-1, Initial Appeal File ("IAF"), Tab 1. During the adjudication of the appeal, the parties reached a settlement agreement that provided, among other things, that the appellant would: 1) withdraw his MSPB appeal and "any and all pending formal and informal complaints against the Agency;" 2) voluntarily resign from the agency effective May 1, 2008; 3) timely submit a retirement application so that it may be effective May 1, 2008; and 4) "be forever prohibited from applying for any position" with ICE. *Id*., Tab 16 at 4. The agreement also provided, among other things, that the agency would: 1) expunge and vacate the proposal notice, decision notice, and SF-50 documenting the removal action that gave rise to the appeal; 2) place the appellant in a leave without pay ("LWOP") status from October 28, 2006, until May 1, 2008; 3) document the appellant's May 1, 2008 separation as a voluntary resignation; 4) "[a]llow [the] Appellant to retire as a Criminal Investigator, GS-1811-13, at his present pay grade of GS-13, step 3 … effective May 1, 2008," and 5) pay attorney fees of $4,000. *Id.* at 3-4. The agreement also provided that if any provision was "declared or determined by any court, administrative tribunal, or agency to be illegal or invalid, [that] would not affect the validity of the remaining provisions." *Id*. at 5.

¶3 In a March 12, 2007 initial decision, the administrative judge found, among other things, that the parties, who were both represented by counsel, understood the terms of the agreement, that they freely accepted the terms of the agreement, and that it was lawful. IAF, Tab 17. Pursuant to the terms of the settlement agreement, the administrative judge entered it into the record for purposes of enforcement by the Board. *Id*.

¶4 While not set forth in the agreement, several facts and provisions of the retirement statutes help reveal one of the clear purposes of the settlement agreement. Under 5 U.S.C. § 8336(c)(1) an employee with 20 years of service as an LEO may retire with an immediate annuity upon reaching 50 years of age, even if he is not serving in an LEO position at the time of his separation. *See* MSPB Docket No. DE-0752-07-0075-C-1, Compliance File ("CF"), Tab 10, Exhibit A (excerpts from the CSRS/FERS Handbook). Here, the appellant obtained 20 years of LEO service in 2004, but did not turn 50 years of age until April 30, 2008. *Id.*, Exhibit B. As mentioned above, under the settlement agreement, the appellant was to separate from the agency on May 1, 2008, the day after turning 50 years of age. Thus, a clear purpose of the settlement agreement was to allow the appellant to meet the retirement requirements of section 8336(c)(1) and retire with an immediate annuity.[1]

¶5 On April 11, 2008, the appellant filed a petition for enforcement in which he alleged that the agency had breached the parties' settlement agreement by issuing a March 13, 2008 decision retroactively removing him from the federal service effective June 8, 2007.[2] CF, Tab 1. In response to the petition for enforcement, the agency acknowledged that it had materially breached the settlement agreement but asserted that it was required to implement the appellant's retroactive removal because: 1) on May 4, 2007, the appellant was convicted of a second degree felony based on his guilty plea; and 2) 5 U.S.C. § 7371(b) requires that a law enforcement officer (LEO) convicted of a felony

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[1] Absent the ability to retire with an immediate annuity under 5 U.S.C. § 8336(c)(1), the appellant would not be eligible to receive a civil service retirement annuity until he reached 62 years of age. *See* 5 U.S.C. § 8338(a). The appellant will not reach that age until the year 2020.

[2] The appellant also filed an appeal of the removal action which was dismissed without prejudice pending resolution of this compliance matter. *Sanchez v. Department of Homeland Security*, MSPB Docket No. DE-0752-08-0289-I-1, Initial Decision (May 16, 2008).

shall be removed from employment as a [LEO] on the last day of the first applicable pay period following the conviction notice date." CF, Tab 5 at 2-5.[3]

¶6 In his compliance decision, the administrative judge found the agency in noncompliance with the settlement agreement but recommended that, despite the appellant's clear desire for specific enforcement of the terms of the settlement agreement, that was not an available option. CF, Tab 11 at 1, 4. The administrative judge further recommended that the Board "afford the appellant the right to have the underlying appeal reinstated or, alternatively, to have the agreement enforced absent the provision to place the appellant in LWOP status from June 8, 2007 through May 1, 2008." *Id.* at 5, footnote omitted. Because the administrative judge found the agency in noncompliance, the petition for enforcement was referred to the Board.

ANALYSIS

¶7 The Board has the authority to enforce a settlement agreement which, like the agreement in this case, has been entered into the record. *Perkins v. Department of Veterans Affairs*, 106 M.S.P.R. 425, ¶ 4 (2007), *aff'd*, 273 Fed. App'x 957 (Fed. Cir. 2008); *Richardson v. Environmental Protection Agency*, 5 M.S.P.R. 248, 250 (1981). While the party asserting noncompliance usually bears the burden of proving by preponderant evidence that the opposing party breached the settlement agreement, *Perkins*, 106 M.S.P.R. 425, ¶ *4; Vaughan v. U.S. Postal Service*, 77 M.S.P.R. 541, 546 (1998), in the instant case, as noted above, the agency acknowledges that it materially breached the terms of the settlement agreement. CF, Tab 5 at 4. Generally, when a party to a settlement agreement materially breaches the agreement, the non-breaching party may elect either to enforce the terms of the agreement or to rescind the agreement and

[3] The agency submitted evidence of the appellant's felony conviction in state court. CF, Tab 5, Subtabs AE 3-5.

reinstate the underlying appeal. *Powell v. Department of Commerce*, 98 M.S.P.R. 398, ¶ 14 (2005); *Betterly v. Department of Veterans Affairs*, 47 M.S.P.R. 63, 66 (1991). The Board has also held, however, that where enforcement of a settlement agreement would not be an effective remedy, rescission of the agreement and reinstatement of the underlying appeal is the only option available. *Powell*, 98 M.S.P.R. 398, ¶ 14; *Diehl v. U.S. Postal Service*, 82 M.S.P.R. 620, ¶ 14 (1999). The administrative judge based his recommendation that enforcement of the terms of the settlement agreement was not an option in this matter on the decisions in *Powell* and *Diehl*, but as discussed below, we do not concur with that recommendation.

¶8 In *Lary v. U.S. Postal Service*, 472 F.3d 1363, 1365-66 (Fed. Cir. 2006), *petition for rehearing denied*, 493 F.3d 1355 (Fed. Cir. 2007), the employing agency agreed in a settlement agreement to provide certain documents pertaining to Mr. Lary's disability retirement application within a specific timeframe, but then failed to do so. In fact, the agency did not provide the documents until after the statutory deadline for Mr. Lary's disability retirement application had passed. *Lary*, 472 F.3d at 1366. The Federal Circuit found that the agency's actions constituted a material breach of the parties' settlement agreement and then found that rescission of the agreement and reinstatement of the underlying appeal was not an adequate remedy because it would not alter the fact that Mr. Lary had missed the statutory deadline for filing for disability retirement. *Id*. at 1367-1369. The Federal Circuit found instead that specific performance was the appropriate remedy and that such a remedy did not have to exactly mirror the performance contemplated by the settlement agreement. *Id*. at 1369. Rather, the court stated that, in ordering specific performance, the order "will be so drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires. It need not be absolute in form and the performance that it requires need not be identical with that due under the contract." *Id.* at 1369, *quoting*, *Restatement Second of Contracts* § 358(1). The court went on to state

that it "should so mold its decree as best to effectuate the purposes for which the contract was made." *Lary*, 472 F.3d 1369 (citing *Corbin on Contracts* § 1137 (Joseph M. Perillo ed., rev. ed. 1993)); *see also Restatement Second of Contracts* § 358 comment a (describing the goal as being "assur[ing] the expectations of the parties"). The Federal Circuit concluded that, because it was impossible for the agency in the *Lary* case to timely provide the retirement related documents, to effectuate the purpose of the settlement agreement, which was to give Mr. Lary the opportunity to timely apply for disability retirement with the support of his employing agency, the appropriate remedy was for the agency to vacate its previous removal, reinstate Mr. Lary, take a new removal action, and provide the necessary documents so that Mr. Lary could timely apply for disability retirement.[4] *Lary*, 472 F.3d at 1369.

¶9 As set forth by the administrative judge in his compliance recommendation, in entering into the settlement agreement, the parties contemplated that the appellant would qualify for an immediate retirement based on his over 20 years of LEO service and his having reached age 50 on April 30, 2008. CF, Tab 11 at 2. The agency's decision to remove the appellant from the federal service effective June 8, 2007, thwarted this purpose of the settlement agreement. As in the *Lary* case discussed above, in the instant case, rescission of the settlement agreement and reinstatement of the underlying appeal would not be an adequate remedy because such a remedy would not alter the fact that the appellant has lost his immediate retirement eligibility because of the agency's breach of the settlement agreement. Accordingly, some form of specific enforcement of the settlement agreement is appropriate. Because enforcement of the exact terms of the

[4] In its decision addressing the agency's petition for rehearing, the court reiterated the Board's broad enforcement authority under 5 U.S.C. § 1204(a)(2), and stated that the statute does not limit the Board's authority to order specific performance. *Lary v. U.S. Postal Service*, 493 F.3d 1355, 1357 (Fed. Cir. 2007). The court denied the petition for rehearing. *Id.*

settlement agreement is impossible, as set forth above, the goal is to craft a remedy that best accomplishes the purpose of the settlement agreement.

¶10 The appellant asserts in his submission to the Board, as he did before the administrative judge, that the agency could have complied with both the requirement of 5 U.S.C. § 7371(b) and the intent of the settlement agreement by placing him in a non-LEO position. Compliance Referral File (CRF), Tab 8 at 5-6; CF, Tab 10 at 3-4. Such a placement is allowed by the statutory scheme of 5 U.S.C. § 7371 which, in addition to stating that an individual convicted of a felony must be removed from his LEO position, also specifically states that it does not prohibit the employment of such an individual in a non-LEO position. 5 U.S.C. § 7371(c)(2). The agency argues that, under the terms of the settlement agreement, it was not required to place the appellant in a non-LEO position because the agreement stated that the appellant was "forever prohibited from applying for any position" with ICE. CF, Tab 5 at 5-6; IAF, Tab 16 at 4. While the administrative judge was persuaded by this argument in his compliance recommendation, we are not. *See* CF, Tab 11 at 4. The settlement agreement prohibits the appellant from applying for a position with ICE, but does not preclude the appellant's placement in another position. IAF, Tab 16 at 4. Moreover, contrary to the agency's argument, it was not required by the settlement agreement to retain the appellant in his Criminal Investigator position. CF, Tab 5 at 6. The settlement agreement states that the agency would "[a]llow [the] Appellant to retire as a Criminal Investigator," but does not preclude his acquiescence to placement in another position. IAF, Tab 16 at 3.

¶11 As stated above, a key purpose of the settlement agreement between the parties in this appeal was to allow the appellant an immediate retirement pursuant

to 5 U.S.C. § 8336(c)(1) effective May 1, 2008. The agency admits that it breached the settlement agreement and prevented a key provision of the agreement from being effectuated. While specific performance with the precise terms of the settlement agreement is not possible because of the statutory prohibition set forth at 5 U.S.C. § 7371(b), the appellant has identified a remedy that accomplishes the purpose of the settlement agreement without being inconsistent with its terms and intent.[5] The imposition of such a remedy is consistent with the Federal Circuit's decision in *Lary* discussed above.

ORDER

¶12 Accordingly, the agency is ORDERED to cancel the appellant's June 8, 2007 removal and place the appellant in a LWOP status in a GS-13 non-LEO position for the period from June 8, 2007, through May 1, 2008. The agency is ORDERED to submit to the Clerk of the Board within 20 days of the date of this Order satisfactory evidence of compliance with this decision. The agency must serve all parties with copies of its submission.

¶13 We also ORDER the agency to identify the individual who is responsible for ensuring compliance and file the individual's name, title and mailing address with the Clerk of the Board within five days of the date of service of this Order. This information must be submitted even if the agency believes that it has fully complied with the Board's Order. If the agency has not fully complied, it must show cause why sanctions, pursuant to 5 U.S.C. § 1204(a)(2) and (e)(2)(A) and

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[5] The agency argues that the instant case is analogous to the situations in *Day v. Air Force*, 78 M.S.P.R. 364 (1998), *Stripp v. Department of the Army*, 61 M.S.P.R. 415 (1994), and similar cases where the Board found that it lacked the authority to enforce a provision of a settlement agreement that called for pay and/or benefits that were contrary to law. The terms of the settlement agreement in the instant case, however, are lawful and, unlike the cases cited by the agency, the intent of the agreement can be met through a slight modification of the terms of the settlement agreement that is lawful. *See Lary*, 472 F.3d at 1369-70.

5 C.F.R. § 1201.183, should not be imposed against the individual responsible for the agency's continued noncompliance.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.